***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

311

# BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 22,547

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UNITED STATES OF AMERICA

v.

TYRONE TERRY,

Appellant

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Appeal from a Judgment of the
District Court for the District of Columbia

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(Appointed by this Court)
1625 K Street, N. W.
Washington, D. C. 20006

March 31, 1969

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3. Was there adequate corroboration of the complaining witness's testimony as to the element of intent to commit carnal knowledge?

This case has not been before this Court previously under the same or similar title, or any other name or title.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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Appellant

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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# BRIEF FOR APPELLANT

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## STATEMENT OF THE CASE

Tyrone Terry was indicted pursuant to Grand Jury Indictment, filed November 20, 1967, which charged that he had violated 22 D.C. Code ¶ 501 (Assault with Intent to Commit Carnal knowledge) and 22 D.C. Code ¶ 3501(a) (Taking Indecent Liberties with a Minor Child), in that:

FIRST COUNT:

> On or about October 3, 1967, within the District of Columbia, Tyrone Terry did make assault upon Elsie E. Martin, a female child under sixteen years of age,

that is, thirteen years of age, with the intent to carnally know and abuse said Elsie E. Martin.

SECOND COUNT:

On or about October 3, 1967, within the District of Columbia, Tyrone Terry did take immoral, improper and indecent liberties with Elsie E. Martin, a female child under sixteen years of age, that is, about thirteen years of age, with the intent of arousing, appealing to and gratifying the lust, passions and sexual desires of the said Tyrone Terry.

Terry entered his plea of not guilty to both of the foregoing Counts at an arraignment held on December 1, 1967. On April 15, 1968, the jury was sworn, and the trial upon the charges was held on April 15, 16, and 17, 1968, Judge Joseph C. Waddy presiding.

The jury found Tyrone Terry guilty with respect to the First Count, Assault with Intent to Commit Carnal Knowledge, and guilty with respect to the Second Count, Taking Indecent Liberties with a Minor Child. However, the District Court set aside the announcement of the verdict as given by the foreman on the Second Count, since the jury had been specifically instructed that if they found Terry guilty with respect to the First Count, they were not to consider the Second Count at all and were to return a verdict of not guilty on that count.

An Order of Judgment and Commitment was issued on September 10, 1968. Terry was sentenced to three (3) to nine (9) years imprisonment. His Motion for Leave to Appeal in forma pauperis was granted on November 1, 1968.

## FACTS

The facts of the case are not complex. The alleged victim, Elsie Elmira Martin, age thirteen at the time of the alleged assault, testified that at approximately 4:00 p.m., on October 3, 1967, she stopped at Romero's Record Shop at 4933 Georgia Avenue, N. W. on her way home from school (Tr. 118-119, 130). When she walked out of the store, she testified that a boy touched her on the "behind" and that she told him to keep his hands to himself. She then walked across the street to buy a bag of potato chips before recrossing the street and starting up Georgia Avenue (Tr. 119).

At that point, Elsie stated that the same boy who had touched her ran up and tried to talk to her (Tr. 120). She said she told him to shut up, since she was reading a book as she walked along. She was not wearing her glasses at that time which she normally wears to correct her farsightedness (Tr. 70). She told him to leave her alone in a loud voice, so that a woman passing by with children also told him to keep away from Elsie (Tr. 120). At this point, she testified that she called him a "dog" and then turned the corner onto Gallatin Street. The boy came up to her, asked her why she called him a dog and why she "loud talked" him, and when she didn't answer, Elsie testified that he hit her with his fist right in the center of the face (Tr. 121, 133).

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Elsie said she was crying at this point but that as she started up the street, the boy said he wanted to talk to her before she went home. They walked to an apartment door (later identified as 912 Gallatin Street, N. W.), where he led her down some stairs to the basement and into a small laundry room (Tr. 122-123). Here Elsie testified that he tried to kiss her and to pull her dress down, before making her lie down on the floor and removing her underpants. These, she said, he put in the back pocket of his trousers which he did not remove (Tr. 123), although she testified that he had unzipped his fly and exposed his privates (Tr. 124). At this point, Elsie said she "started getting scared," and put her foot on his privates and pushed him. She then started screaming and hollering, whereupon she said he jumped up and kicked her in the eye. Elsie apparently freed herself and ran out the door. In her estimation, the whole episode took about fifteen minutes from the time of the first touching outside Romero's Record Shop to the time of the alleged assault in the basement (Tr. 124).

A short time after the alleged attack was supposed to have occurred, a detective, Thomas N. McGlynn, received a complaint from Elsie Martin at the Sixth Precinct station (Tr. 144). He testified that Elsie was nervous, fast talking and generally upset when she made the report (Tr. 146). The detective testified that she had physical contusions and

bruises about her face (Tr. 144). Photographs were taken of her condition and introduced into evidence at the trial. This was the extent of the prosecution's case, and, at the close of Detective McGlynn's testimony, the Government rested (Tr. 147).

Prior to the trial before the jury, a suppression hearing was held on appellant's motion to exclude all evidence concerning two pretrial identifications (Tr. 9-103). During that hearing, certain facts were elicited which were never presented to the jury. For example, both Detective McGlynn and Elsie testified that she gave a description of her assailant at the Sixth Precinct station on October 3, 1967 shortly after the attack allegedly occurred (Tr. 17, 75). The details of her description were never presented to the jury. Detective McGlynn testified from notes that the description given at that time was that the attacker was a Negro male, 17 years, 5' 8", medium build with a very dark complexion, short hair and depressed eyes (Tr. 17).

Detective McGlynn also testified during the suppression hearing that when he interviewed Elsie on October 3, he immediately suspected that Tyrone Terry might be the alleged assailant (Tr. 27, 31, 33). Although he stated that he did not convey this suspicion to Elsie at that time, she revealed on direct examination that Detective McGlynn did in fact tell her on October 3 that a suspect, Tyrone Terry, was the person involved (Tr. 58).

Also while at the precinct station on October 3, 1967, Detective McGlynn showed Elsie a large group of photographs from a flip album of mug shots (Tr. 62, 85). She testified during the pretrial hearing that Terry's photo was not among those she viewed at that time (Tr. 62). Detective McGlynn, on his part, did not at first remember that he had shown any photographs to Elsie on October 3, but he was later recalled to the stand and, after refreshing his recollection, confirmed that he had shown the precinct's flip album to the complaining witness (Tr. 85).

Also during this pretrial hearing, it was revealed that on October 12, 1967 Terry had been arrested and held on a separate and unrelated charge. Detective McGlynn testified that upon learning of that other offense on October 17 he thought that his initial suspicion of Terry as the assailant in the present case had been correct. Accordingly, he said he selected a group of seven photographs (a part of this record) to show to Elsie which he felt were similar in the general characteristics they exhibited (Tr. 15). Tyrone Terry's photograph was among those seven.

Detective McGlynn and another officer took these seven photographs to the complaining witness's home on October 17, 1967. Elsie had had no contact with the police since an interview with the Sex Squad on October 4 (Tr. 49, 54). From the group, Elsie selected Terry's photograph and identified him as

her assailant (Tr. 14, 57). The photographs had rogue numbers on the front and the person's name on the back (Tr. 18, 86).

Upon being asked which if any of the photographs she had seen on both October 3 at the Sixth Precinct station and on October 17 at her home, Elsie demonstrated some considerable confusion, but she was consistent in saying that Terry's photograph was shown to her only once, which was at her home on October 17, 1967 (Tr. 62, 82).

Two days later, on October 19, 1967, a preliminary hearing was held at the District of Columbia Court of General Sessions. Prior to the preliminary hearing itself, there was a confrontation in the hall outside the courtroom between Elsie and Tyrone Terry. Testimony was adduced from both Detective McGlynn and Elsie to the effect that they were standing in the hall near the courtroom door when Terry, accompanied by a marshal, came walking down the hall towards them and the courtroom (Tr. 20-27; 64-67). The actual sequence of what transpired at that time is not clear from the testimony, but it seems certain that Detective McGlynn did greet Terry in some familiar manner, perhaps even calling him by name (Tr. 22). Subsequently, Elsie and Detective McGlynn followed Terry and the marshal into the courtroom, and later during the preliminary hearing, Elsie again identified Terry as her assailant (Tr. 24).

On appellant's motion to strike all evidence relating to the two pretrial identifications, the trial court ruled,

based upon the holdings in Stovall v. United States, 388 U.S. 293 (1967) and Simmons v. United States, 390 U.S. 377 (1968), that the complaining witness's pretrial identifications of Terry were so unnecessarily suggestive and conducive to irreparable mistaken identity as to amount to a denial of his right of due process of law (Tr. 101-102). Accordingly, all testimony was excluded which related to Elsie's pretrial identifications. However, the trial court specifically allowed Elsie to make an in-court identification based upon her observations prior to and separate and apart from the impermissibly tainted pretrial identifications (Tr. 102). Appellant objected to any in-court identification (Tr. 103).

Later, at the close of the Government's case, appellant renewed his motion to strike the in-court identification on the grounds that it was unduly tainted by the pretrial identifications (Tr. 151-155). The District Court denied that motion. In the alternative, Terry's counsel moved for a judgment of acquittal on the ground that the prosecution had failed to produce the required direct or circumstantial corroborative evidence as to either Terry's identification or the elements of the crime itself (Tr. 155-170). This motion was denied as well (Tr. 171).

After these motions, Tyrone Terry took the stand to testify in his own behalf. He testified that on October 3, 1967 he was employed at the Upshur Playground and that he

worked there from 6:00 a.m. to 2:00 p.m. each weekday. He could not remember precisely as to the day in question, but it was his custom to go home after work and sleep during the afternoon (Tr. 193). He stated that he had never seen the complaining witness before, that he did not see her on October 3, 1967, and that he did not hit, assault or speak to her on October 3, 1967 (Tr. 179). After the defense had rested, Terry's counsel renewed his motion for acquittal, which motion was denied.

The trial court instructed the jury that, in the event they found Terry guilty of assault with intent to commit carnal knowledge, they were not to consider the taking indecent liberties count (Tr. 253). Simultaneously, the Court instructed the jury that if they were not satisfied beyond a reasonable doubt that appellant had the specific intent to have sexual relations with the complainant, but they were satisfied that it was he who struck her or in some other manner used force against her, then they must decide whether he was guilty of the lesser included offense of simple assault (Tr. 256). Accordingly, the jury was instructed as to the essential elements of simple assault (Tr. 257). The trial court also instructed the jury that if the Government had failed to prove beyond a reasonable doubt any one or more of the essential elements of any of the charges outlined, then they must find the defendant not guilty (Tr. 259, 261).

## ARGUMENT

### I.

### THE TRIAL COURT ERRED IN FINDING THAT THERE WAS AN INDEPENDENT SOURCE FOR THE COMPLAINING WITNESS'S IN-COURT IDENTIFICATION.

(With respect to Argument I, since the question raised by this argument depends, as a matter of law, on all the circumstances relating to Elsie's identification, appellant feels it is important that the Court review the entire suppression hearing, Transcript pp. 9-103. Alternatively, appellant invites the Court's attention to Elsie's testimony, Transcript 53-84 and 117-143, with particular emphasis on pp. 56, 58-59, 62-63, 68, 71, 74; Detective Hosie's testimony at p. 51; the trial court's ruling at pp. 101-103; and to the Original Record, Detective McGlynn's "Affidavit in Support of an Arrest Warrant.")

It is appellant's contention that the trial court erred in allowing Elsie Martin's in-court identification of Tyrone Terry. That identification was the product of unnecessarily suggestive circumstances. It was not based on an independent source, and its admission is an error requiring reversal.

The question presented is whether the complaining witness's identification of appellant was based on sources other than illegal pretrial procedures. Or put another way, did Elsie's in-court identification have an "independent source" or was it impermissibly tainted by the suggestive procedures surrounding her photographic identification of Terry on October 17 and her preliminary hearing identification on October 19? Resolution of this question depends on all the circumstances relating to Elsie's identification. All the factors bearing upon its reliability must be considered. Clifton Gregory v. United States, No. 21,089 (D.C. Cir., March 18, 1969), slip op. at pp. 10-11; Clemons, Clark & Hines v. United States, Nos. 19,846, 21,001, 21,429 (D.C. Cir., December 6, 1968).

The factors which the trial court found to support the reliability of the identification were (1) the length of time Elsie said she was with her assailant, (2) the apparently adequate outdoor lighting conditions of 4:00 p.m. on an October afternoon, and (3) the description the police testified Elsie gave them on October 3, 1967 (Tr. 102). These factors, however, are not unqualified and must be considered in the light of other factors relating to the identification.

First, as to the trial court's reliance on the length of time Elsie was with her assailant, the only testimony on that fact is from the prosecutrix herself. In "sex offense" cases, corroboration is required as to the prosecutrix's identification of the accused. Allison v. United States, No. 21,862 (D.C. Cir., Feb. 17, 1969). Unreliability is the cause for the requirement of corroboration in those cases. Reliability is the issue surrounding Elsie's in-court identification as well, and there is no corroboration whatsoever that she was with her assailant for ten to fifteen minutes. It was error for the trial court to rely on that factor as a reliable source for her in-court identification.

Second, there is no corroboration of either the adequacy of the lighting conditions or the promptness of the report to the police. These were also grounds on which the trial court relied, and on which there is no testimony except that from the prosecutrix herself. They should not be considered reliable sources for her identification.

Third, Elsie's October 3, description of her assailant is unreliable. The record reveals a discrepancy as to that

description which weakens it as a source of independent support for the in-court identification. The facts bearing on that description are as follows: Detective McGlynn testified from some notes as to the purported details of the description given by Elsie at the Sixth Precinct on October 3 (Tr. 16-18). Elsie testified that she remembered saying that her assailant was "dark-skinned, he had high cheekbones, his eyes were far back into his head and he had large lips" (Tr. 75).

The consistency of Elsie's and Detective McGlynn's testimony here would be persuasive if (1) it was confirmed and (2) this case did not give rise to the possibility of influence on the young complaining witness. There is no written confirmation of the details of the description. No complaint was introduced. The only written record is Detective McGlynn's own "Affidavit in Support of an Arrest Warrant" (a part of the appeal record), which states that "Elsie Elmira Martin N/F 13 yrs. of 727 Hamilton Street, N. W. reports that . . . she was approached by a Negro male who placed her in fear . . ." (emphasis supplied). In addition, Detective Baker of the Sex Squad testified that when Detective McGlynn called him on October 3 to transmit the details of the offense report, Detective McGlynn's description of the assailant was only that it was "a Negro male, 17 years old" (Tr. 51). There is no evidence that a more detailed description was ever given to the Sex Squad.

The evidence surrounding the description reveals a sufficient inconsistency, it is submitted, to warrant this Court in finding that the description was not a reliable basis for determining the independence of Elsie's in-court identification.

Fourth, there is the pervasive presence of Detective McGlynn. Appellant contends that that presence influenced Elsie throughout the case and resulted in her identification of him.

Detective McGlynn knew Tyrone Terry well from his work as a police officer (Tr. 22, 29). He had on other occasions placed Terry under arrest himself (Tr. 19). When Elsie reported her story, Detective McGlynn immediately suspected Terry, and told her Tyrone Terry was the person involved (Tr. 58). It was Detective McGlynn who selected the group of seven photos to show Elsie at her home. He supervised the photographic identification. He was standing in the hallway of General Sessions with Elsie when the illegal confrontation occurred. It is submitted that the continued influence of a policeman who had focused on Terry infected Elsie's identification and illegally resulted in appellant's conviction.

Fifth, the reliability of Elsie's identification was weakened by the lapse of time. The in-court identification occurred six months after the alleged offense, and the inadmissible pretrial identifications occurred more than two

weeks after the assault. Furthermore, she testified that she had never seen Tyrone Terry before the attack occurred (Tr. 130). These facts rob both the illegal identifications and the in-court identification of the indicia of reliability sometimes provided by fresh recollection or prior acquaintance with the subject. Clemons v. United States, supra, p. 17.

Sixth, Elsie was the victim of the assault. This factor raises the danger discussed in Wade v. United States, 388 U.S. 218, 230 (1967), that a victim's "understandable outrage may excite vengeful or spiteful motives." In addition, the excitement of the moment and the youthful age of the complaining witness increase the possibility of misidentification.

Seventh, the record supports the inference that on October 3 Elsie failed to identify Terry as her assailant. Appellant contends that it is more likely than not that Tyrone Terry's photograph was among those Detective McGlynn showed Elsie on October 3 and that she failed to identify Terry as her assailant. Appellant is not asking this Court to indulge in speculation. An examination of the evidence surrounding that photographic viewing permits the inference suggested.

The facts which make it highly unlikely that Detective McGlynn would have omitted showing Elsie a photograph of Terry on October 3 are: (1) his immediate suspicion of Terry (Tr. 27-28); (2) his telling Elsie that a man named Tyrone

Terry was the person involved (Tr. 58); and (3) his showing her a large number of photographs from the precinct flip album (Tr. 56, 62, 85). The unlikelihood of Terry's photo not being shown was emphasized by Detective McGlynn's comment that of the photos shown Elsie on October 17, she had probably seen all of them but Terry's on October 3 (Tr. 86). The likelihood of the suggested inference must be weighed, of course, against Elsie's specific denial that she saw Terry's photograph on October 3 (Tr. 62-63).

Appellant contends that the record supports the inference that Terry's photo was among those Detective McGlynn showed Elsie on October 3 and that she did not identify him. Elsie's failure to identify Terry indicates that, even if she did have ample opportunity to observe her alleged assailant, she did not settle upon Tyrone Terry until after the police had named him and conveyed to her their focus on him as the guilty party. This factor must be considered in assessing the reliability of her ultimate identification.

All of the above discussion of the evidence in the record must go toward the determination of how "independent" Elsie's in-court identification was. Even though there is testimony which, if it stood alone, might be enough to establish an independent source in another case, it is submitted that it is not enough in this case. The facts of this case which require that the determination of "independence" be made with

special care are: (1) that the single witness to the alleged offense was of impressionable age and in an unstable emotional condition at that time; (2) that the police officer who handled Elsie's complaint from the beginning immediately focused on Tyrone Terry as the guilty party; and (3) that Terry was linked to the offense only after improper and unusually suggestive procedures.

In light of these facts and the circumstances surrounding them, it is submitted that it was error for the trial court to find that there was an "independent source" for Elsie's in-court identification.

II.

THE MOTION FOR ACQUITTAL SHOULD HAVE BEEN GRANTED BECAUSE THE TESTIMONY OF THE PROSECUTRIX WAS NOT ADEQUATELY CORROBORATED AS TO THE IDENTITY OF THE APPELLANT.

(With respect to Argument II, appellant invites the Court's attention to Transcript pp. 124-126, 178-179.)

It is appellant's contention that the Government failed to corroborate the prosecutrix's identification. The law of the District of Columbia is settled that no person may be convicted of a "sex offense" on the uncorroborated testimony of the alleged victim. Kidwell v. United States, 38 App. D.C. 566, 573 (1912). Corroboration is required as to both (1) the corpus delicti and (2) the identity of the accused. See Allison v. United States, No. 21,862 (D.C. Cir., Feb. 17, 1969), and cases cited therein at slip op. p. 4, n. 6.

Further, where the alleged assault is committed upon a child, as here, it is clear that scrupulous care must be taken to assure that the child's testimony is adequately corroborated. In Wilson v. United States, 106 App. D.C. 226, 227, 271 F.2d 492, 493 (1959), a case involving a conviction for taking indecent liberties with an eleven-year-old girl, this Court reversed, stating as follows:

> A woman's uncorroborated tale of a sex offense is not more reliable than a man's. A young child's is far less reliable. "It is well recognized that children are more highly suggestable than adults. Sexual activity, with the aura of mystery that adults create about it, confuses and fascinates them. Moreover, they have, of course, no real

> understanding of the serious consequences of the charges they make. As a consequence, most courts show an admirable reluctance to accept the unsubstantiated testimony of children in sexual crimes." Guttmacher & Weihofen, Psychiatry and the Law (1952), p. 374.

In the instant case, the Government sought to corroborate Elsie's story through the testimony of a single police officer, Detective McGlynn. That testimony, taken at its best, amounts to a statement that the complaining witness did in fact report an attempted rape, that she did have bruises and contusions about her head, that she gave a description of her assailant, and that she did subsequently identify Tyrone Terry, albeit under illegal procedures.

Nothing ties Tyrone Terry to this offense except Elsie's description (which appellant submits is questionable) and her subsequent identification (which appellant submits was tainted). The trial court was in error in finding corroboration for Elsie's identification in her own testimony. All the testimony as to the length of time she was with the assailant, the lighting conditions, and the promptness of the report came from the prosecutrix herself.

This case is not like Thomas v. United States, 128 U.S. App. D.C. 233, 387 F.2d 191 (1967), where there was medical proof of a rape and no special circumstances which cast doubt on reliability of her identification. This case is not like Calhoun v. United States, ____ U.S. App. D.C. ____, 399 F.2d 999 (1968), where the prosecutrix identified Calhoun immediately

after the gang attacks, where other witnesses testified as to the lighting conditions, and where Calhoun was wearing the fish-net shirt described by the victim. These are those "particular" cases referred to in Franklin v. United States, 117 U.S. App. D.C. 331, 330 F.2d 205 (1964), where a convincing identification need not be further corroborated.

Here, however, there is no convincing identification. Here, there were unnecessarily suggestive procedures, delay in the identification, and no corroboration of the events by other witnesses. In addition, Terry testified that he did not know Elsie Martin, that he did not see her on October 3, 1967, and that he did not assault her.

Further, the record is curiously lacking in potentially corroboratory testimony. For example, there was no testimony from Elsie's mother. Theoretically, the mother could have attested to her daughter's physical and emotional condition when she arrived home and the precise time of her arrival. Nobody testified whether Elsie returned home with or without her underpants which she alleged her assailant stuck in his back pocket. Nor was there corroboratory testimony from Elsie's sister, who was told of the attempted rape (Tr. 72). There was no corroboratory testimony as to the physical condition of the laundry room in the basement of the Gallatin Street apartment house where the alleged assault and scuffle took place. There was no corroboratory evidence of anybody seeing

Elsie at Romero's Record Shop, or at the place where she bought the potato chips or from the woman and children Elsie said she encountered on the street.

In short, there is insufficient corroboration of Elsie's story to permit the jury to conclude that Tyrone Terry attacked her. The only corroboration is her report to the police, and that has been shown to be subject to the very real possibility of suggestive influence. The uncorroborated state of the evidence, taken together with Terry's denial of any involvement in the matter, dictates that the motion for acquittal should have been granted.

III.

THE MOTION FOR ACQUITTAL SHOULD HAVE BEEN GRANTED BECAUSE THERE IS NO CORROBORATION OF THE INTENT ELEMENT OF THE OFFENSES CHARGED.

(With respect to Argument III, appellant invites the Court's particular attention to Transcript pp. 123-124, 165-166.)

If this Court should find (1) that there was an adequate independent source for Elsie's in-court identification and (2) that there was sufficient corroboration of Elsie's testimony as to Terry's identity, then it is appellant's contention that the trial court erred in not granting a judgment of acquittal as to Counts 1 and 2 (Tr. 155-171), because the Government failed to prove an intent to commit carnal knowledge or to take indecent liberties with a minor. There is no corroboration of the complaining witness's testimony that a sexual attack occurred.

In Allison v. United States, No. 21,862 (D.C. Cir., Feb. 17, 1969), this Court held that where the record, in a sex offense case, is barren of corroboration as to the material facts indicating an intent to commit carnal knowledge, a conviction of assault with intent to commit carnal knowledge cannot stand. Allison v. United States, supra, slip op., p. 7.

Allison was charged in a two-count indictment with (1) assault with intent to commit carnal knowledge and (2) taking indecent liberties with a minor child. Terry was similarly charged in this case. The facts in Allison are quoted from the opinion below:

Mary Brown, the prosecutrix, was eleven years old at the time of the alleged assault. She was walking home with her ten-year old brother, Joseph, and her five-year old cousin, Edward, when appellant stopped the three and took Joseph into his house. Mary and Edward followed. Appellant gave Joseph some money and sent him to the store for some sodas. As Mary was leaving the house with the two boys, appellant grabbed her and slammed the door. After trying to kiss her, he put a white shirt on the couch and threw her upon it. Some wrestling and screaming ensued, during which, in Mary's words, appellant threatened to "cut my neck off" if she continued to scream. Mary testified that appellant then "opened his zipper and took out his private," got on top of her, and "tried to pull my pants down." At about that point, Joseph and Edward returned with the sodas. Finding the door closed and hearing the screams of his sister, Joseph looked through the keyhole and saw appellant on top of Mary, holding her down on the couch. He banged and kicked on the door. Mary apparently freed herself and ran to the door, where Joseph told her how to open it. As Mary ran out, Joseph gave appellant the sodas and the change and then ran home with Edward.

Shortly afterwards, Miss Nettie Farrow went to Mary's house to find out why she was crying. Mary told her that "some man had pulled her in the house." During this time Mary "looked like she was in hysterics." Miss Farrow and Mary then left to find a policeman. Officer Geffen testified that he was summoned by Mary, who was waving her arms and yelling for the police. She was crying and appeared "emotionally upset, sort of hysterical." (At pp. 2-3).

The Court stated in its opinion the general proposition that the law of this jurisdiction is that no person may be convicted of a "sex offense" on the uncorroborated testimony of the alleged victim. Allison v. United States, supra, slip op., p. 3; Kidwell v. United States, supra; Fountain v. United States, 98 U.S. App. D.C. 389, 391, 236 F.2d 684, 686 (1956);

Wilson v. United States, 106 U.S. App. D.C. 226, 271 F.2d 492 (1959). In this regard, corroboration is required as to both (1) the corpus delicti and (2) the identity of the accused.

In Allison, no question was raised concerning identification. However, it was alleged that there was not sufficient corroboration as to the corpus delicti, which in a given case consists of all the material elements of the crime charged. A similar deficiency exists in the Government's case against Tyrone Terry.

Referring to Hammond v. United States, 75 U.S. App. D.C. 397, 127 F.2d 752 (1942), the Court in Allison set forth the elements of assault with intent to commit rape as follows: "(1) an assault, (2) an intent to have carnal knowledge of the female, and (3) a purpose to carry into effect this intent with force and against the consent of the female." Clearly, when the intended victim is a child under the age of sixteen, the third element is dispensed with, so that intent to use force need not be alleged or proved. Allison v. United States, supra, slip op., pp. 5-6.

Continuing, the Court conceded that, putting aside the matter of corroboration for a moment, the Government's case established an intent to commit carnal knowledge. Similarly, in the case against Tyrone Terry, if corroboration were not required by law, Elsie's testimony would establish an intent to commit the offense charged. According to her testimony,

Terry tried to kiss her, pulled her dress down, forced her to lie on the floor, removed her underpants, unzipped his fly, and exposed himself. As in Allison, if this testimony were corroborated, it would surely support a jury finding that Terry entertained the intention to carnally know Elsie Martin.

In Allison, the Court found that there was some corroboration of Mary Brown's testimony. In particular, it noted the testimony of her ten-year-old brother, Joseph, that he had (1) heard his sister screaming and (2) seen Allison on top of her on the couch. The Court also noted the testimony of Miss Farrow and Officer Geffen, which tended to show (1) Mary's prompt reports to a friend and the police and (2) her distraut and emotional condition. It also noted that the record disclosed no apparent motive for Mary to fabricate her story. The Court found that the above corroboration in Allison supported a conviction of taking indecent liberties, but that it could not withstand a motion for judgment of acquittal as to assault with intent to commit carnal knowledge. It based its decision on the absence of corroboration as to what purportedly took place in the accused's apartment, including most significantly Allison's attempts to kiss Mary, the exposure of himself and his attempts to remove her clothing.

In an identical fashion, there is no corroboration of Elsie's allegations that Tyrone Terry sexually attacked her. There is no corroboratory eye-witness testimony similar to

that adduced from the little brother, Joseph. No one testified, as Joseph did, that he heard Elsie scream or saw Terry on top of her. No one testified that Terry was in the neighborhood, that he saw Terry with Elsie, or that he saw Terry hit her. There was no physical evidence of a sexual assault. As in the Allison case, there is no corroboration whatsoever as to what purportedly took place in the room where the sexual attack allegedly occurred, the basement on Gallatin Street. There is nothing in the record to support Elsie's allegation that Terry attempted to kiss her or exposed himself, or removed her clothing. In short, there is no corroboration of any intent to commit carnal knowledge or to take indecent liberties with a minor.

The trial court should have entered a judgment of acquittal as to Counts 1 and 2 since there was insufficient corroboration as to the element of intent.

## CONCLUSION

In view of the foregoing, it is prayed that the Court reverse the conviction entered in the trial court and remand with instructions to enter a judgment of acquittal, and for such other relief as the Court deems just and proper.

Respectfully submitted,

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March 31, 1969

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT





UNITED STATES OF AMERICA )
v. )
TYRONE TERRY )

Appeal No. 22,547

Suggestion
MOTION FOR HEARING EN BANC OR FOR A REHEARING

Judgment was entered in this appeal on January 14, 1970 affirming appellant's conviction for assault with intent to commit carnal knowledge (22 D.C. Code § 501).

A conflict now exists in this jurisdiction as to whether every material element of sexual offense cases must be corroborated. The Court's opinion in United States v. Terry holds that there is adequate corroboration of a complaining witness's testimony if there is "any evidence outside of the complainant's testimony, which has probative value--any evidence which could convince the trier of fact that the crime was committed" (slip op., p. 5). This standard of corroborative proof is irreconcilable with the Court's two preceding pronouncements in sexual assault cases which specifically require corroboration of the complainant's testimony for each material element of the sex offense. United States v. Mack J. Bryant, No. 22,511 (D.C. Cir., December 11, 1969); Allison v. United States, ___ U.S. App. D.C. ___, 409 F.2d 445 (1969). All three cases involve assault with intent to commit rape or carnal knowledge, but the Terry decision, unlike Bryant and Allison, does not require corroboration as to the element

of intent. This inconsistency and the importance of the issue of whether corroborative proof is required as to each element in a sex offense case require that there be an en banc hearing by the Court.

The decision in United States v. Terry raises the issue precisely. Even though there is no evidence in the record corroborative of Terry's intent to commit carnal knowledge, the Court (consisting of Circuit Judges Miller, Wright and Tamm) affirmed the conviction. It relied for corroboration of the fourteen-year-old girl's testimony upon the complainant's (1) facial bruises, (2) prompt reporting, (3) emotional condition, and (4) lack of motive to fabricate.[1/] These factors do not corroborate the element of

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1/ In Terry, the Court appeared to also rely quite heavily upon the fact that "defense counsel did not contest the complainant's version of the assault" (slip op., pp. 3, 8-9). In all due respect, defense counsel vigorously disputed the Government's version of the assault during his argument on defendant's motion for judgment of acquittal. Appellant feels this misapprehension by the Court is significant enough to set out that argument [Tr. 165-6]:

> MR. MADSEN: . . . there is no corroboration here of the assault with intent to commit carnal knowledge, other than the testimony of the complaining witness.
>
> THE COURT: But the detective saw the physicl [sic] and emotional condition of the girl at the time he saw her some minutes after the alleged affair. --
>
> MR. MADSEN: Your Honor, --
>
> THE COURT: -- and are we to disregard the pictures which corroborate the fact that an assault had been made upon her?
>
> MR. MADSEN: Simple assault, yes, but sexual assault, no. There is no question, and I cannot in good conscience stand before you and say there is no corroboration as to assault, but there is no evidence before this Court -- [continued on page 3]

intent. Under the Court's recent decisions in Bryant and Allison, intent must be corroborated.

Appellant is not seeking to steer the Court toward "the Scylla of a corroboration requirement incapable of attainment." He is seeking even-handed application of the rule that each element of a sex offense be corroborated. If that rule is applied to Terry--and not some more general requirement of "any evidence which has probative value"--the result should be a reversal or

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1/ THE COURT: Well, it is seldom that you have anything other than the testimony of the person who is involved. Are we going to say that we have to have an eyewitness to the actual offense? So I think it will be an impossible burden upon the Government.

MR. MADSEN: Your Honor, it was completely within the purview of the Government to find out what this girl complained of to the police.

THE COURT: Certainly, certainly. And the testimony of the officer here corroborated her testimony that she was assaulted.

MR. MADSEN: Assaulted, yes, but --

THE COURT: And also, in this Court's opinion, this certainly lends some credence to the rest of her testimony.

MR. MADSEN: Your Honor, I will just have to abide by Your Honor's feelings --

THE COURT: So far as the assault being a sexual one is concerned.

MR. MADSEN: But the Government does not elicit from the prosecutrix what she told the police, didn't elicit from the complaining witness what she told her mother, and the Government didn't produce any evidence whatsoever from a medical point of view that this girl was sexually assaulted. We have nothing here but the bald statement of a girl; one, that she was assault; two, that his man did it.

the reduction of the conviction to the lesser included offense of simple assault.[2] Appellant concedes that the evidence corroborates the complainant's testiony to some extent, but not to the extent of the offense for which he was convicted.

The element of intent in sexual assault cases is not impossible to corroborate.[3] In Terry, possible sources of corroboration would have been testimony as to the condition of the girl's clothing, whether she returned home with or without her underpants which she alleged appellant removed and put in his back pocket, physical markings on sexual areas of the body, the physical condition of the laundry room where the attack allegedly occurred, or testimony from the girl's mother or sister. Instead, the Government offered nothing more than the girl's statement and the police officer's testimony that she had bruises on her face and was nervous and upset (Tr. 144-146).

Until the Court's decision in Terry, a conviction for assault with intent to commit rape in this jurisdiction required proof of intent. In the leading case, Hammond v. United States, 75 U.S.

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2/ The jury was instructed as to the elements of simple assault, a lesser included offense of assault with intent to commit carnal knowledge (Tr. 257).

3/ The elements of an assault with intent to commit rape are (1) an assault, (2) an intent to have carnal knowledge of the female, and (3) a purpose to carry into effect this intent with force and against the consent of the female. Hammond v. United States, 75 U.S. App. D.C. 397, 127 F.2d 752 (1942). If the victim is a child under the age of sixteen, the third element is dispensed with. Allison v. United States, supra, fns. 14 & 15.

App. D.C. 397, 127 F.2d 752 (1942), the defendant's touching of a girl's private parts was not sufficient to show intent. In Miller v. United States, 93 U.S. App. D.C. 76, 207 F.2d 33 (1953), medical evidence and the defendant's oath that he would not touch the girl again, together with other corroboration, were sufficient to show intent. In Fountain v. United States, 98 U.S. App. D.C. 389, 236 F.2d 684 (1956), the defendant's confession as to taking indecent liberties was not sufficient to show intent to commit carnal knowledge absent still other proof such as medical testimony or physical markings.

The most recent sexual assault cases--Allison and Bryant--also clearly require proof of the specific element of intent. The panel of judges in Allison explicitly required corroboration as to all of the material elements of the assault with intent to commit carnal knowledge with which the defendant in that case was charged. Allison v. United States, supra, 409 F.2d 445, 447 (1969). The appellant conceded in Allison that the record contained sufficient corroboration as to the first element, namely, assault, but he argued that there was insufficient proof of the second element, namely, an intent to have carnal knowledge. This is precisely appellant's contention in the present case.

The Court in Allison agreed that, although parts of the complaining witness's testimony was corroborated, the record was barren of corroboration as to the material facts indicating an intent to commit carnal knowledge.

In the Bryant case, the panel of judges also explicitly required corroboration of each element of the assault with intent to commit rape with which the defendant in that case was charged, United States v. Mack J. Bryant, supra (slip op., p. 4) and cited every major sex offense case in this jurisdiction as support for that proposition.

The Court in Bryant found that the complaining witness's torn shoulder strap was enough independent corroboration to permit the case to go to the jury. This piece of evidence was some corroboration of the element of intent. In addition, there was the complainant's prompt report, her emotional condition, her bruises, and the fact that when the police arrived on the scene, the defendant, who was coming up the basement stairs, turned and started back down. The Court said, in reviewing this evidence:

> The evidence is more clear as a corroboration that there was an assault which frightened the victim than as corroboration of the defendant's intent to achieve a penetration by force, if necessary, to overcome the continuing resistance of the victim. Although the corroborative evidence is marginal (later the Court describes it as "minimal," p. 8), we think it suffices for purposes of the doctrine requiring corroborative evidence. [Emphasis added]

The evidence in Terry is much weaker than the "marginal" or "minimal" evidence in Bryant. There is no evidence which is commensurate with the torn shoulder strap or of Terry's presence at the scene or of any guilty behavior when seeing police officers.

The panel of judges in Terry did not require that there be corroboration of the complainant's testimony as to each and every

element of the sex offense charged, and, instead, said that there is sufficient corroboration if there is "any" evidence which could convince the jury that the crime was committed. More specifically, the Court concluded that (slip op., pp. 8-9):

> the Government's independent evidence regarding the complainant's bruises and contusions, prompt reporting, distraught emotional condition, and lack of motive to fabricate, viewed in light of the fact that the defense did not contest the complainant's version of the assault, was sufficient to warrant submission of the corroboration question to the jury under proper instructions.

It is appellant's specific contention that this evidence, while admittedly corroborative of something akin to simple assault, does not fulfill the requirement of corroboration as to all the elements of the crime of assault with intent to commit carnal knowledge.

In Terry, there was no corroboration of the complaining witness's allegations that appellant attacked her. There was no corroboratory eyewitness testimony similar to that adduced in Allison. There was no evidence that Terry was with the complaining witness or that he was even near the scene of the alleged offense. There was absolutely no evidence of a sexual assault. As in the Allison case, there was no corroboration whatsoever as to what purportedly took place in the room where the sexual attack allegedly occurred. There was nothing in the record to support the complaining witness's allegation that Terry attempted to kiss her or exposed himself or removed her clothing.

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In sum, the Terry case cannot stand alongside the Court's Bryant and Allison decisions. They are in conflict as to what must be corroborated. A trial court cannot know, in an assault with intent to commit rape case, whether there must be corroboration of the element of intent or whether, as in Terry, it is sufficient that there is simply some more general corroboration of the complaining witness's testimony. Until this matter is resolved, defendants will receive different treatment depending on which case the trial judge follows.

Accordingly, appellant respectively requests that the Court hear this case en banc and that it resolve the conflict in favor of the requirement that corroboration be required as to the element of intent, thereby requiring a reversal of the existing Terry decision and an entry of judgment of acquittal or reduction of the conviction to one of simple assault, or for such other relief as the Court deems just and proper.

Respectfully submitted,

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Dated: January 27, 1970